

## FERNANDO v. FERNANDO.

D. C., Negombo, 4,143.

1903

April 7.

*Evidence—Admission of documents tendered in evidence—Proper description of them in list annexed to the pleading—Civil Procedure Code, ss. 51, 54—Technical objections—Adjournment of case.*

Deeds identified, in the list of documents annexed to a plaint, by numbers and dates are receivable in evidence if duly proved and tendered.

If the defendant is not prejudiced by their production at the trial, the Court should disregard purely technical objections and use the discretion given it by section 54 of the Civil Procedure Code.

LAYARD, C.J.—In my opinion, if a plaintiff intends to rely on a document in support of his title to property, which he is not bound to set out in his plaint, he should give due notice of it to defendant by succinctly stating the names of the parties, the date and nature of the instruments so relied on, in the list attached to his plaint.

Where a plaintiff endeavours to read and tender in evidence a document not properly described in such list, and objection is taken to its admission by the opposite party, and where the Judge considers that he is prevented from receiving material or available evidence by reason of the technical objection taken to its reception, it is his obvious duty to remove the technical objection out of the way by even, if necessary, granting an adjournment as a matter of course, without being asked for it, to enable the defendant to examine the document which the plaintiff desires to read in evidence.

THE first plaintiff as owner, and the second plaintiff as lessee, of a certain land brought this action in ejectment against the defendant, whom they alleged to be an over-holding tenant. The defendant denied the first plaintiff's title and set up title in himself by prescription.

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The District Judge rejected the first plaintiff's title deeds tendered in evidence, and held against him on the question of title. He ruled out the issue whether the defendant had taken a lease from plaintiff, and refused to admit seven deeds which the first plaintiff tendered in evidence in support of his title, because the defendant's counsel objected to their reception on the ground that they were not properly described in the list required by section 51 of the Civil Procedure Code.

The District Judge considered himself bound by the decision reported in 2 C. L. R. 170. He said:—

" Of these documents, A, B, C, E, F and G are mentioned in the list attached to the plaint. None of them were filed with the plaint, and none of them bear any description but number and date. Document D is not mentioned in the list, but is referred to in the list of witnesses and is equally badly described. In these circumstances I cannot accept these documents in evidence. "

He dismissed the plaintiff's case.

The plaintiff appealed.

The case was argued on the 31st March, 1903, before Layard, C.J., Moncreiff, J., and Wendt, J.

*Sampayo, K. C.*, for appellants.

*H. Jayawardene*, for respondent.

*Cur. adv. vult.*

The Supreme Court set aside the judgment of the Court below and remitted the case for a new trial.

*Sampayo, K.C.*, for appellants.

*H. A. Jayawardene*, for respondent.

7th April, 1903. MONCREIFF, J. (in the course of his judgment dealt with the plea of *res judicata*, and made the following observations on the rejection of the plaintiff's documents).—I can see no justification for this order; the Judge should have admitted the documents in the exercise of his discretion. Documents A, B, C, E, F and G were not filed with the plaint; they were mentioned in the list attached to the plaint, and bore their numbers and dates. The Judge is mistaken in saying that they were not described in accordance with section 51, of the Civil Procedure Code. I find no provision such as he suggests in the section.

Document D was not mentioned in the list attached to the plaint, but in the list of witnesses. The Judge, however, as may be seen from section 54 of the Code, has a discretion which is given him for the purpose of enabling him to disregard purely technical objections of this description which have no substance in them. Bonser, C.J., in *Read v. Samsudin* (1 N. L. R. 292), declared in the strongest terms that it was no part of a Judge's duty to give effect to purely technical objections to the prejudice of the administration of justice, as pointed out in the passage he quoted from Sir George Jessel; at the very least an adjournment might be given and costs reserved. Some support is claimed for the Judge's ruling from a case cited from 2 C. L. R. 170. But the Judges who decided that case held in *Allis v. Babunhamy* (2 N. L. R. 198) that when the plaintiff filed his title deed with his plaint, but did not annex it to the plaint, he had given further notice than he was obliged to give; that all he need have done was to state the number and date of the deed in a list and produce it at the trial; that the defendant was not prejudiced, and that the Judge should have used the discretion given him by section 54 of the Civil Procedure Code.

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I agree, and only desire to add that the Judge was clearly wrong in absolutely refusing to admit in evidence all the documents mentioned in the list attached to the plaint. In rejecting them it is true that he purported to follow the decision of Justices Lawrie and Withers in 2 C. L. R. 172, in which they held that the requirements of section 51 of the Civil Procedure Code had not been fulfilled in a case in which the list appended to the plaint did not sufficiently disclose the nature and contents of the deeds relied on by the plaintiff. The attention of the District Judge was, however, not drawn to a later decision of this Court on the same point in which the same Judges, apparently not being very much impressed with their ruling in the former case, held that all the plaintiff need do under section 51 is to state the respective numbers and dates of the deed in the list appended to his plaint. (*Allis v. Babunhamy*, 2 N. L. R. 198.)

In my opinion, if a plaintiff intends to rely on a document in support of his title to property, which he is not bound to set out in his plaint, he should give due notice of it to defendant by succinctly stating the names of the parties, the date, and nature of the instrument so relied on, in the list attached to his plaint. At the same time I wish I could impress on every Judge in the Island that,

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taken to its admission by the opposite party, and whenever the Judge considers that he is prevented from receiving material or available evidence by reason of the technical objection taken to its reception, it is his obvious duty to remove the technical objection out of the way by even, if necessary, granting an adjournment as a matter of course, without being asked for it, to enable the defendant to examine the document the plaintiff desires to read in evidence.

That such would be the duty of an English Judge has been pointed out by the late Sir George Jessel in a passage in his judgment in the case of *Jones v. Chennell*, 8 Chan. D. 506, which will be found quoted by my distinguished predecessor in his judgment in the case of *Read v. Samsudin* reported in 1 N. L. R. 292. In the case of *Read v. Samsudin* objection had been taken and upheld in the lower Court to the production of a document not included in the list of documents attached to the plaint. Chief Justice Bonser invited the attention of the Judges of this Island to the ruling of Sir George Jessel above-mentioned, and expressed his surprise that such a technical objection as that taken in the case then under his consideration could have been allowed to prevail in any Court in this Island. The judgment of the District Judge must be set aside and the case be remitted to the District Court for a new trial.

WENDT, J.—I agree.

